IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 622 of 1994

1. Bhimrao Nivrutti Jagdale
2. Duryodhan Bhimrao Jagdale
3. Suhas Bhimrao Jagdale .. ... Appellants
(Orig.defct nos.1 to 3)

V/s

1. Ambadas tulshiram Jagdale
2. Dagadu Digamber Jagdale
3. Kamalabai Digamber Jagdale .. Respondents
(Orig.plff and deft
nos.4 and 5)

Mr.R.V.More with Mr. Shantaram Dheple for
Appellants

Mr.Rahul Kate for Respondent no.1

CORAM:S.R.SATHE,J.

DATED:28th October 2005

JUDGMENT :-

1. The Appellants, original defendant nos.1 to 3 in

regular Civil Suit No.47 of 1980 have preferred this appeal against the judgment and order passed by the Court of Additional District Judge, Pandharpur whereby the order passed by the Civil Judge, J.D., Sangola decreeing the plaintiff's suit for declaration and possession was confirmed and the appeal was dismissed (for sake of convenience hereafter parties shall be referred to as the plaintiff and defendants).

2. Brief facts giving rise to this appeal are as under:

. The original defendant no.1 Bhimrao Nivrutti Jagdale is the uncle of plaintiff Ambadas Tulshiram Jagdale. Defendant nos.2 and 3 are the sons of defendant no.1. Plaintiff's father Tulshiram and defendant no.1 were having a joint family, however, oral partition took place in between them some time in the year 1950 and they started residing separately. On 22-7-1956 written partition took place and accordingly the names of the plaintiff's father Tulshiram and his brother Bhimrao were entered in record of rights to the lands allotted to their respective shares. At the time of partition only 4 survey numbers were kept common, same being shown as **Vastipad**. The rest of the property was divided between Ambadas and Bhimrao.

3. The suit land bearing survey no.47/1 of which block number is 180, described in detail in para 1A of the plaint was initially in possession of the plaintiff's

father Tulshiram as a tenant. After his death the name of the plaintiff was entered in the record of rights in respect of the said land. Plaintiff became the owner of the said land by virtue of 32G proceedings of Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter called as BTAL Act) and accordingly certificate under Section 32M of the said Act was issued in the name of the plaintiff. The said land was in actual possession of the plaintiff. However, in the year 1969-70 when Consolidation Scheme was made applicable, the name of the defendant no.1 was wrongly entered in the record of rights for the said land. Along with plaintiff he was also shown as owner of the said lands. On the basis of the said entry the defendants started laying a claim over the said land and took actual possession of the same. Plaintiff, therefore, submitted an application to the Consolidation Officer for deleting the name of the defendant no.1. Accordingly, after holding an enquiry the Consolidation officer deleted the name of the defendant no.1 and consequently mutation entries no.56 and 17 were made on 14-9-1970. However, the defendant no.1 also made an application to the revenue authorities and the said application was allowed. The appeal preferred by the plaintiff against the said decision was dismissed. However, it was directed that the parties should get their disputes resolved by approaching the Civil Court.

4. The suit lands described in detail in para 1B,1C and

1D were purchased by the plaintiff's father out of his own income. Defendants had no concern with the said lands. However, at the time of application of Consolidation Scheme the name of the defendant no.1 was also entered in the record of rights of the said land and on the basis of the same the defendant took possession of the said lands. As the defendants unauthorizedly and illegally took the possession and started taking income of the said lands and refused to hand over possession when asked by the plaintiff, he filed the suit for declaration and possession.

5. The defendant no.1 filed his written statement at Exh.34 and opposed the suit claim. He admitted the relationship between the parties and submitted that partition had taken place between the plaintiff's father and him. He however, denied the plaintiff's allegation that the suit land described in para 1A of the plaint i.e. the land bearing survey NO.47/1 which is subsequently numbered as Block No.180 was only in possession of the plaintiff's father as a tenant. He contended that the said land was in actual possession of plaintiff's father and him, however, as it was tenanted land, the same could not be included in the partition. He was having separate possession of half share. Not only but he also contended that at the time of 32G proceedings, the price of the land was paid by him and plaintiff's father equally. Thus, according to him plaintiff is not the sole owner of the said land.

6. The defendant no.1 also contended that the suit lands described in detail in para 1B, C and D were purchased by him and plaintiff's father in the name of plaintiff's father, he being elder brother. Though the said lands were standing in the name of plaintiff's father defendant was having separate possession to the extent of half share on northern side. At the time of Consolidation Scheme as per actual vahiwat his name was entered in the record of right of the said land. Thus, according to the defendants when plaintiff's application made before the revenue authorities was dismissed, only with a view to harass the defendants plaintiff filed a false suit. Lastly defendants contended that the plaintiff's suit is barred by law of limitation. Hence on all these grounds the defendants prayed for dismissal of the suit.

6. The defendant nos.2 and 3 filed purshis Exh.34A and adopted the written statement of defendant no.1.

7. As the name of the defendant no.4 was also appearing in the record of rights in respect of lands described at 1B, C and D he was made party. However, plaintiffs did not seek any relief against him. Defendant no.5 is the sister of the plaintiff. She filed her written statement at Exh.15 and supported the claim of the plaintiff.

8. On these pleadings the learned trial Judge framed issues at Exh.35. In order to prove the suit claim

plaintiff examined himself at Exh.49 and 2 wittiness viz. Damu Appa Bhosale Exh.50 and Ramchandra Jagdale Exh.78. As against this, the defendant no.1. examined himself at Exh.80. Plaintiff produced several other documents in support of his case. After considering the evidence adduced by both the parties, the learned trial Judge came to the conclusion that plaintiff's father alone was tenant in the land bearing survey no.47/1 i.e. Gat No.180 and defendant no.1 failed to prove that he paid half of the price at the time of 32G proceedings. He, therefore, held that plaintiff alone is the owner of the said land and defendant is not concerned with the same. Similarly, he held that the plaintiff has proved that lands mentioned at para 1B, C and D are exclusively owned by the plaintiff and defendants have no concern with the same. The trial Court therefore decreed the suit in plaintiff's favour.

9. Being aggrieved by the said judgment, the defendants filed Regular civil Appeal No.37 of 1985 and after hearing the arguments of both the learned Advocates the first Appellate Court came to the conclusion that the plaintiff has proved the suit claim and decree passed by the trial Court is correct. He, therefore, confirmed the order passed by the trial court and dismissed the appeal.

10. Being aggrieved by the said order the original defendants filed the present second appeal. At the time admission of the said appeal, this Court on 19-12-19994

passed the following order :

"Admit on the point raised at ground nos.(a), (c), (d), (f), (h), (k). The said grounds are as under:

a) Whether the lower Court are justified in passing a decree for declaration and possession of the suit lands in view of the fact that the suit lands remain joint family property and Mutation entry No.1430 at Exh.53 clearly shows that no mention of suit properties was made at the time of partition.

c) Whether the certificates of partition dated 9-4-1964, and the fact that Gat NO.180, was tendered land which was purchased under 320 proceedings clearly shows that this land joint family property and name of father of plaintiff appeared in the record only because he was elder brother of defendant no.1 and therefore, karta of the family,

d) Whether the other suit lands i.e. 148, 135 and 134, were joint family properties, as they were jointly purchased by the present appellant and his elder brother Tulshiram and hence, whether the Respondents/plaintiff was entitled for possession of the same as self acquired of the deceased Tulshiram.

f) Whether the suit lands remained joint as lands at the time of partition of 1956 and hence a joint family properties of deceased Tulshiram and present Appellant and whether the plaintiff is entitled to declaration sought by him in the present suit by stating that the properties are self acquired properties of deceased Tulshiram.

h) Whether the lower Courts are justified in dis-regarding the provisions of Hindu Law, which go to show that at the time of partition some properties may be left as joint family properties and hence in the present instance land bearing Gat NO.180 on account of its being tenanted land in 1956 remained joint family property as also the other properties i.e. Gat No.148, 135 and 134 remained joint family properties on account of vastipad lands.

k) Whether the lower Courts ought to have seen that Mutation Entry No.1403(Exh.53) clearly shows that there is no mention of suit properties which would go to show that the suit properties remained joint at the time of partition of 1956.

11. At the time of hearing of this appeal the learned Advocate for the defendants-Appellants has urged only 3 points. Firstly, he submitted that from the evidence on record it is evident that the land Bearing Block No.180 was in possession of the plaintiff's father as a tenant and at that time there was joint family of plaintiff and defendants and as such the defendant was also having possession of the said land. At the time of 32G proceedings defendant no.1 paid half price of the said land and thus became joint owner of the said land. However, the courts below did not properly appreciate the evidence in that behalf and wrongly held that the plaintiff is the sole owner of the said land. Secondly, he canvassed before me that lands described in detail in para 1B, C and D were not purchased by plaintiff's father out of his own income but half price of the said lands was paid by defendant no.1 and as such he became joint owner of the said lands. However, the trial Court failed to appreciate the evidence in this behalf and reached to a wrong conclusion. Lastly, he submitted that the Courts below ought to have taken into consideration the fact that right from 1970 the name of the defendant no.1 was entered in the record of rights and he was shown in possession of the said lands to the extent of half share and held that the plaintiff is not entitled to get the possession.

12. The learned Advocate for the defendants Appellants

also argued before me that the first appellate court had not framed proper points for determination in conformity with the Order 41 Rule 3A of Code of Civil Procedure and as such the appeal be allowed.

13. As against this, Shri Kate,learned Advocate for the Respondents supported the judgment and order passed by the courts below.

14. The relation between the parties is not in dispute. Admittedly, the present dispute is only in respect of 4 lands described in detail in para 1A to 1D. So far as the land bearing Survey NO.47/1 which is subsequently numbered as Block No.180 is concerned, it is the case of the plaintiff that he has received the said property in 32G proceedings and certificate under Section 32M of BTAL Act dated 9-4-1969 Exh.60 is issued in his favour, and thus he is the sole owner of the said land. From the perusal of the said certificate it is very clear that the land is purchased by the plaintiff’s father and on the basis of the same it is evident that he is the owner of the said land. It is the contention of the defendant that the said land was in fact in possession of the plaintiff’s father as a tenant when there was joint family of the plaintiff and the defendant no.1 and as it was tenanted land even at the time of partition the said land was not included in partition. According to the defendant no.1 even prior to 32G proceedings he was in actual possession of the said land and half portion on

the northern side of the said land was being cultivated by him. Naturally, the question arises, whether the defendant has adduced any satisfactory evidence to show that he was in possession of the said land even prior to 32G proceedings. At the outset it must be mentioned that defendants has clearly admitted that he has no documentary evidence to show his separate possession of the said land. Not only that, but besides the bare word of the defendant he has not adduced any other evidence to support his contention. We cannot ignore the fact that if really the defendant no.1 had any right, title or interest in the said land bearing Survey NO.47/1 and was in actual separate possession of certain portion of the said land as contended by him, then certainly we would have found atleast his name in the cultivation column in 7x12 extract of the said land. But it is not so. Moreover, when admittedly written partition took place between defendant no.1 and plaintiff atleast at that time the defendant no.1 would have insisted that land bearing Survey No.47/1 be shown as common property in the said partition. However, that has also not happened. Naturally, this indicates that there is no substance in the contention taken by the defendants that he was in actual separate possession of half share of the said land even prior to 32G proceedings. Besides this, though defendant no.1 has contended that at the time of 32G proceedings he paid half price of the said land he has not adduced any evidence to support the said contention. On the contrary, the evidence on record viz. 7x12

extracts of the said land right from the year 1956-57 clearly indicate that initially plaintiff's father was cultivating the said land as a tenant and after his death plaintiff was cultivating the same. During 32G proceedings, it was plaintiff who paid price and as such Certificate under Section 32M of the BTAL Act was issued in his name.

15. Plaintiff's witness Damu Bhosale Exh.50 who is having land near the suit land has also specifically stated that the plaintiff was in possession of the suit lands. Similarly plaintiff's other witness viz. Ramchandra Jagdale Exh.71 has also stated that he was present at the time of partition between the plaintiff and defendant no.1 and at that time the land bearing Survey NO.47/1 was not kept common. We cannot ignore the fact that the plaintiff as well as the defendant no.1 are the nephews of the said witnesses, so, it is not the case that the said witness is interested only in plaintiff. Under such circumstances, due weight shall have to be given to the testimony of this witness when he says that lands in question are owned and possessed by the plaintiff and when the said version is also corroborated by other documentary evidence. I am, therefore, of the view that both the courts below rightly held that the plaintiff has become the sole owner of the suit land by virtue of Certificate Exh.60 issued in his favour.

16. The learned Advocate for the plaintiffs-Respodnents

submitted that certificate issued under Section 32M has to be regarded as conclusive proof of purchase. For this proposition he has placed reliance on a case Sau.Saraswatibai Trimbak Gaikwad V/s Damodhar D. Motiwale and Ors. **AIR 2002 SC 1568** wherein the Apex Court has held that certificate of ownership granted to tenant/purchaser is conclusive proof of purchase. Having regard to all this evidence and positional law I have no hesitation to hold that the plaintiff has proved that the land described in para 1A of the plaint is exclusively owned by him, and defendants have no concern with the same, and it is only on this basis of the entry made in their names defendants unauthrosiedly obtained the possession.

17. So far as the other 3 lands are concerned, it is the case of the plaintiff that the same were purchased by his father Tulshiram out of his own income and the same were in his exclusive possession. It is pertinent to note that even according to the defendants the remaining 3 lands i.e. Gat NO.134, 135 and 148 were not standing in the name of defendant no.1, however, according to them the said lands were purchased by plaintiff's father and defendant no.1. If really that would have been a case then normally the defendant no.1 would have insisted to include his name in the said transaction and ultimately in 7x12 extract. However, admittedly, the name of the defendant no.1 was never entered in the record of rights of the said lands till the year 1970. Not only that but

his name was also not shown as person in possession of the said lands. Besides this when according to him the said lands were purchased prior to the partition then atleast at the time of partition he should have insisted that the said lands be shown as the property kept common between plaintiff's father and him. However, if we read the mutation entry no.1430 which is at Exh.53 it is clear that written partition between the defendant no.1 and plaintiff's father took place on 28-4-1956 and in the said partition there is no mention of the above mentioned four lands as the lands either allotted to the share of the plaintiff's father or as the lands kept common. This clearly indicates that the said lands were exclusively owned by the plaintiff's father. The defendant no.1 was not at all concern with the same and as a result of the same the said lands were not mentioned in the partition. Here again we find that besides the interested word of the defendant no.1 there is absolutely no evidence to show that purchase price of the said lands was paid by the defendant no.1. Thus we find that though defendant no.1 contended that he had paid half purchase price of the suit lands, he has miserably failed to adduce any evidence to support his contention. Naturally, both the courts below, rightly held that evidence on record is sufficient to establish that the plaintiff is owner of the suit lands and defendants are not having any right, title and interest in the said lands.

18. Though at the time of admission it is mentioned that

appeal is admitted on the points raised at ground nos.a), c), d), f), h) and k), the learned Advocate for the Appellants defendants has failed to point out any question of law much less substantial question of law involved in the matter.

19. In my opinion, there is in fact no substantial question of law involved in the matter. The learned Advocate for the Appellants defendants submitted that the first appellate court has not properly framed the points for determination and as such it is necessary to allow the appeal. For this proposition, he has placed reliance on a case Janardan Nago Patil V/s Ramanand Ramdas Mishra **2003(4) Mh.L.J.853**. It is true that in that case this Court remanded the matter to the first appellate court to frame proper points and record its finding on all points urged before it. However,in the case at hand, the first appellate court had raised following point for determination, viz. "Whether the Appellant proves that finding of the learned Civil Judge are erroneous and the order of the lower court is liable to be set aside."

20. It is true that above point is very vague and not properly worded. However, that by itself is not sufficient to jump to the conclusion that appeal has to be allowed and matter needs to be remanded. Ultimately, what is necessary to be seen is, whether the first appellate court has taken into consideration all points involved in the matter and urged before him. From the

perusal of the judgment of the first Appellate Court it appears that all points involved in the matter and the points which were urged before him are considered by the said Court. So, merely because technically he has not framed specific points for determination, in connection with each point involved in the matter, it cannot be said that the said judgment is liable to be set aside. In the case cited above this Court found that the first appellate court had not applied its mind to the points urged before it and had not recorded its decision on facts urged before it. However, such is not the position in the case in hand. From the perusal of the judgment of the first appellate court it is very clear that the learned first appellate court has taken into consideration all points involved and argued before it and has passed a reasoned order. So, under such circumstances merely because the point actually framed by him is not happily worded appeal cannot be allowed. There is no substance in the argument advanced by the learned Advocate for the Appellant defendants in this behalf.

21. In this view of the matter the appeal is dismissed with costs. The defendants to hand over possession of the suit property to plaintiff within two months from today.

(S.R.SATHE,J.)